Supreme Court, U.S.
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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1995

**ADELE FULLER, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF RALPH E. FULLER, JR.**

**Petitioner,**

**v.**

**THOMAS CUMMINGS; MICHAEL KING; CARL LA BIANCA; THE CITY OF NORWALK AND NORWALK POLICE DEPT.,**

**Respondents,**

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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33 pp

## QUESTION PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING EVIDENCE THAT A DECEDENT WAS CARRYING AN UNLOADED WEAPON WHEN IT WAS BEING OFFERED ON THE ISSUE OF A MATERIAL WITNESS' CREDIBILITY.

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## LIST OF ALL PARTIES TO THE PROCEEDING

Petitioner:

Adele Fuller, Individually and as Executrix for the Estate of Ralph E. Fuller, Jr.

Respondents:

Thomas Cummings

Michael King

Carl La Bianca

The City of Norwalk

Norwalk Police Department

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## STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Petitioner, Adele Fuller, as Executrix of the Estate of Ralph E. Fuller, Jr. ("Fuller"), seeks this writ of certiorari from a denial of a petition for rehearing issued by the United States Court of Appeals, Second Circuit, on April 10, 1995.

This writ of certiorari originally arises from a jury verdict in favor of the Respondents and entered by the United States District Court for the District of Connecticut, on February 10, 1994, the Honorable Ellen Bree Burns, United States District Judge presiding.

An appeal was timely filed and on February 22, 1995, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

A petition for rehearing was timely filed with the United States Court of Appeals for the Second Circuit and on April 10, 1995, said petition was denied.

In accordance with Supreme Court Rules #10(1)(c), 12, and 13 the Supreme Court has jurisdiction to review this matter on certiorari.

Subject matter jurisdiction for this civil action is conferred by 28

U.S.C. §§ 1331 and 1334(1), (3) and (4) along with 42 U.S.C. §1983, 1985, 1988 and the First, Fourth and Fourteenth Amendments to the United States Constitution.

## CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances.

Constitition of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On July 8, 1986, Norwalk Police Officers Thomas Cummings and Michael King fatally shot Ralph E. Fuller, Jr. At the time this incident occurred Officer Cummings had been a member of the Norwalk Police Department since July 1983, and King had been a member since October 1983.

At approximately 8:45 p.m. on July 8, 1986, Officers Cummings and King, acting in their capacity as police officers responded to a police radio dispatch stating there was a man with a gun in South Norwalk. Within two minutes of the radio dispatch the two officers arrived at the scene. It was dusk and beginning to get dark.

Upon arriving at the scene, Officers King and Cummings observed Ralph Fuller turn and face them. Fuller was holding a rifle in his right hand with the barrel pointing at the ground. The officers reached for their weapons, exited their vehicles, and took a position behind the doors of their squad car. Cummings was armed with a twelve-gauge shotgun and King a .38 caliber service revolver. Their car was approximately 20 to 25 ft. from Mr. Fuller.

Both officers ordered Mr. Fuller to drop his weapon. This

order was given several times, and Fuller did not respond to the orders.

At some point the officers exited from behind their car doors. Civilians were entering into the area. The officers testified they were afraid that if Fuller attempted to shoot he might hit an innocent bystander.

The officers now approached Fuller. Cummings came to a stop at an eleven o'clock position relative to Fuller (compared to Fuller's center clock position), and King came to a stop relative to a two o'clock position. Officer Cummings was standing approximately eight to ten feet away from Fuller. Officer King initially stopped approximately six to eight feet from Fuller. He eventually closed that gap, standing a mere four to six feet away from Fuller at the time the shooting took place.

From this close vantage point, the officers again asked Mr. Fuller to drop his gun. There were several women approximately fifteen feet to the right of the officers who were also shouting for Fuller to drop the gun. At one point Cummings stated to this group of women: "Tell him to drop the rifle or I will shoot him." Cummings

ordered Fuller to put down the gun "or someone will hurt you."

According to Cummings, he told Fuller to put the weapon down stating, "Lets talk about this." At this point, Fuller was looking at Cummings and not at King. The officers testified that Fuller stated, "What are we going to talk about?" and raised his rifle toward Officer King with his right arm. At this moment King fired his first shot into Fuller. After King fired the first shot Cummings discharged his shotgun. However, Cummings testified that he did not fire his weapon because King fired his. Rather Cummings made his own determination, independent of King's decision to fire, that it was necessary to shoot his weapon in order to save King's life. Cummings stated, "I fired because I thought he was going to kill Officer King, not because Officer King fired first."

Both King and Cummings each fired another round at Fuller. Mr. Fuller was struck by all four shots fired by the officers. Within two minutes after the officers had left their vehicles and confronted Mr. Fuller, he was dead.

The Petitioner was precluded by the trial judge from introducing direct evidence that Mr. Fuller's rifle was unloaded at the

time of the shooting. However, Cummings testified that he had observed a muzzle flash coming from Fuller's rifle prior to discharging his second shot. Further, the officer testified that at the time he saw the muzzle flash, he believed that Fuller had fired on Officer King. The Plaintiff attempted to introduce evidence that the gun was unloaded and thus could not have possibly produced a muzzle flash to demonstrate that the officers' perceptions were inaccurate. Similarly the Petitioner also sought introduction of this evidence for the purpose of showing that Fuller could not have possibly been shooting at King, which was what Cummings testified he thought was happening. The court refused to allow the Petitioner to pursue this line of questioning on the grounds that it was irrelevant as to the reasonableness of the officers' conduct.

However, the Petitioner was permitted to elicit testimony from an eyewitness to the shooting who testified that Mr. Fuller stated aloud that the gun was not loaded. Further, another eyewitness testified that Mr. Fuller told her and her sister to "calm down, don't worry, the gun's not loaded, it doesn't even work." This was said while the officers were behind their vehicles and it was said loudly

enough for them to have heard Mr. Fuller say it. Fred Tate testified that Mr. Fuller "told the police that the gun is not loaded. Don't shoot."

Also, the testimony of the officers concerning the events surrounding the shootings was contradicted by an array of witnesses. Seven witnesses testified that Mr. Fuller did not raise the rifle toward the officers at any time during the incident. An eyewitness testified that just prior to the shots being fired, he observed Fuller shrug his shoulders. Several witnesses, in direct contradiction to the testimony provided by Officers King and Cummings, testified that Mr. Fuller's fingers were not on the trigger, but rather lower down on the rifle stock.

## ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING EVIDENCE THAT A DECEDENT WAS CARRYING AN UNLOADED WEAPON WHEN IT WAS BEING OFFERED ON THE ISSUE OF A MATERIAL WITNESS' CREDIBILITY.

The material issue at trial was whether Officers Cummings and King acted reasonably in shooting the decedent, Ralph Fuller. Officer Cummings testified that at the time he shot Fuller the second time, he thought that his partner had been shot and that he saw a muzzle flash come from Fuller's rifle. Petitioner at the time sought to introduce evidence that Fuller's rifle was unloaded for the purpose of impeaching Cummings' testimony. The trial court excluded this evidence for its lack of relevancy. However, by excluding this evidence the trial judge denied the jury the opportunity to assess the officer's credibility with regard to the material issue at trial, the reasonableness of the officer's conduct.

Claims that police officers have used unreasonable, excessive and unjustified force in the course of an arrest are analyzed under the Fourth Amendment standard of objective reasonableness, judged from

the perspective of a reasonable officer on the scene at the time of the incident. Graham v. Connor, 490 U.S. 386, 395-396; Anderson v. Branen, 17 F. 3d 552, 560 (2d Cir. 1994) Cummings testified at trial that he had seen a muzzle flash from the direction of Fuller's rifle and had believed at the time that Fuller had fired on Officer King. Petitioner's counsel therefor sought to introduce testimony that Fuller's rifle was unloaded as a basis for discrediting Cummings' perceptions as to the events of the shooting incident as they unfolded. The Court refused to admit the evidence and the following dialogue took place:

> "The Court: Well, perception might have been wrong but the perception it was is his perception. Not whether it was right or wrong but his perception.
>
> Mr. Slez: You are absolutely correct, Your Honor, it was his perception that there was a muzzle flash from Fuller's gun. At some point he made that determination. But the jury has the right to know that that perception, while that was his perception, it was inaccurate.
>
> The Court: That doesn't matter. That was his

perception. It doesn't matter at any point in this testimony. There's other testimony that you are talking about that may be coming in that suggests that wasn't a reasonable conclusion, but at this point in time, with the evidence we have so far, the jury has to decide whether that was reasonable or not. Two people there with guns. He sees a flash. Was it reasonable for him to assume it was poor Mr. Fuller instead of the officer?" (Trial transcript, t 13a, as submitted in Appellee's brief to the United States Court of Appeals for the Second Circuit).

In cases where an officer's conduct is being called into question for the use of excessive force, the issue for the jury is to determine whether or not the police officers are justified in using such force under the totality of the circumstances present before them at the moment of the incident. Graham v. Connor, Supra. The issue for this Court is whether or not evidence that Fuller's rifle was unloaded at the time of the shooting incident is relevant to this determination for purpose of impeachment. If the fact that the decedent's rifle was unloaded is relevant to the officer's determination of whether or not he

was justified in using force in this situation, the trial court clearly abused its discretion by not allowing the Petitioner to introduce such evidence for impeachment purposes. While a witness may not be impeached by contradiction as to collateral or irrelevant matters elicited on cross-examination, there is no such rule of evidence which allows the trial judge to prohibit testimony relevant to a material matter and introduced for the purpose of impeaching the witness' perceptions as to what he observed. Taylor v. National R. R. Passenger Corp., 920 F. 2d 1372 (7th Cir. 1990) rehearing denied. Although Officer Cummings was a witness in Petitioner's case-in-chief, the Federal Rules of Evidence #607 states that "(t)he credibility of a witness may be attacked by any party, including the party calling the witness".

"The trial court has broad discretion in determining whether proffered evidence should be admitted, see United States v. Robinson, 560 F. 2d 507, 513-515 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905, 98 S. Ct. 1451, 55 L. Ed. 2d 496 (1978), and in general in the 'absence of a significant showing of unfair prejudice, evidence with substantial probative value should not be excluded.'" Martell v.

Boardwalk Enterprises, Inc., 748 F.2d 740 (2d Cir. 1984), citing United States v. Jamil, 707 F.2d 638, 644 (2d Cir. 1983). However, "as a general rule, the credibility of a witness has nothing to do with whether or not his testimony is probative with respect to the fact which it seeks to prove." United States v. Welsh 774 F.2d 670, 672 (4th Cir. 1985). It is thus held that "(t)he Court(s) should avoid any blanket prohibition on exploration of an area that is central to an assessment of the witnesses' reliability." United States v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990).

In United States v. Kane, 944 F. 2d 1406, (7th Cir. 1991), the Court stated that impeachment of one's own witness cannot be permitted where employed as mere subterfuge to present to the jury evidence that could not otherwise be admissible. This appears to be the only exception to the general right of any party in a civil matter to introduce evidence that calls into question the accuracy of a witness' observation, recollection, or truthfulness. Graham Lily, An Introduction To the Law of Evidence.

Evidence that Fuller's gun was unloaded calls into question the accuracy of the Respondent Cummings' observations at the time he

shot Fuller. The trial judge may have felt the evidence that the gun was unloaded was too prejudicial, however, where such evidence is pertinent to an assessment of the witness' credibility in regard to a material fact, its prejudicial nature is not an issue for the trial judge, but rather for the jury to determine.

The trial court clearly abused its discretion in precluding evidence pertaining to the credibility of Respondent Cummings and the judgment should therefore be reversed. The standard for reversal on appeal is "a clear showing that the Court abused its discretion." United States v. Laughlin, 772 F.2d 1382 (7th Cir. 1985)

At the time Officer Cummings testified that he saw a muzzle flash come from the decedent's gun and at that moment thought the decedent was firing at his police partner, evidence that the decedent's gun was unloaded was obviously relevant for purposes of impeaching Cummings' testimony on the material issue of Cummings' reasonableness in shooting the decedent.

Fed. R. Evid. 401 states: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

probable than it would be without the evidence." This is not meant to be an exacting standard. Officer Cummings' statements to the effect that he thought his partner was being fired upon and that he thought he saw a muzzle flash come from Mr. Fuller's weapon clearly makes relevant the fact that Fuller's weapon was unloaded. Therefore, had the Petitioner been able to introduce direct evidence that Fuller's weapon was not loaded, this would have enabled the jury to make a proper determination as to the credibility of Officer Cummings' testimony relating to the reasonableness of his actions.

The District Court excluded the evidence that Fuller's weapon was unloaded on grounds of relevancy. (2nd Circuit Ct. decision) In affirming that decision, the Second Circuit Court of Appeals affirmed this decision "[i]n view of the rationale given by the District Court and the risk of prejudice had the evidence been admitted."

The rationale given by the District Court was simply that this evidence was irrelevant. That is definitely incorrect. The Second Circuit gives great weight to the fact that Officer King's gun could have produced the muzzle flash witnessed by Officer Cummings. This fact would ostensibly lessen the relevance of the gun being unloaded had

Officer Cummings not testified that he thought his partner was being fired upon. If Officer Cummings simply saw a muzzle flash before he shot Mr. Fuller, and that muzzle flash could have been from his partner's weapon, the fact that Fuller's weapon was not loaded would not necessarily be as relevant in assessing Cummings' testimony. It would not cast doubt on Cummings' ability to reasonably perceive the events taking place at the time of the incident, because in fact there was a muzzle flash emitted from the gun of Officer King.

However, Officer Cummings' testimony was not simply that he had seen a muzzle flash. As the Second Circuit's decision summarizes, "Cummings testified that he had seen a muzzle flash from the direction of Fuller's rifle and had believed at the time that Fuller had fired on Officer King." The evidence that Fuller's rifle was not loaded is obviously relevant to Officer Cummings' testimony for purposes of impeaching his credibility. Evidence that Fuller's gun was not loaded directly sheds doubt on Officer Cummings' ability to observe what was transpiring at the time he shot Fuller. "Credibility questions are, of course, solely within the province of the jury." Seifert v. Solem, 387 F.2d 925 (7th Cir. 1967), citing Sartor v. Arkansas

National Gas Corp., 321 U.S. 620, 64 S. Ct. 724, 88 L.Ed. 967 (1944)

By excluding evidence relevant to the credibility of Officer Cummings' testimony, the trial judge usurped the jury's duty to resolve issues of credibility.

## CONCLUSION

For the reasons stated above, this Court should grant certiorari in this case to review the question presented herein.

THE PETITIONER,

BY:_____
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IN THE

**UNITED STATES SUPREME COURT**

OCTOBER TERM, 1995

**ADELE FULLER, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF RALPH E. FULLER, JR.**

**Petitioner,**

**v.**

**THOMAS CUMMINGS; MICHAEL KING; CARL LA BIANCA; THE CITY OF NORWALK AND NORWALK POLICE DEPT.,**

**Respondents,**

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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# DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of February, one thousand nine hundred and ninety-five.

PRESENT: HONORABLE JON O. NEWMAN,
Chief Judge
HONORABLE ELLSWORTH A. VAN GRAAFEILAND
HONORABLE JOSE A. CABRANES,
Circuit Judges

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ADELE FULLER, individually and as
Executrix for the Estate of RALPH E. FULLER, JR.,
Plaintiff-Appellant,

v.

THOMAS CUMMINGS, MICHAEL KING, CARL LA BIANCA,
THE CITY OF NORWALK and NORWALK POLICE DEPARTMENT,
Defendant-Appellees

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ORDER

Appeal from the United States District Court for the District of Connecticut (Ellen Bree Burns, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was

argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Plaintiff Adele Fuller, as executrix for the estate of Ralph E. Fuller, Jr. ("Fuller"), appeals from the February 10, 1994, judgement entered after a jury trial in this civil rights action. Plaintiff alleged that Norwalk police officers Michael King and Thomas Cummings used excessive force when they shot and killed Fuller while attempting to disarm and arrest him. The evidence at trial showed that Fuller was holding a rifle as the defendants approached him. The defendants testified that they shot Fuller when he suddenly raised the rifle, thereby placing them in immediate danger of being shot. The jury found that neither defendant used an objectively unreasonable level of force under the circumstance. On appeal, plaintiff argues that the District Court erred by excluding certain evidence on grounds of relevancy.

1. Plaintiff argues that the District Court should have admitted evidence showing that Fuller's rifle had not been loaded during the confrontation with officers Cummings and King. Claims that police officers have used excessive force in the course of an arrest are analyzed under the Fourth Amendment standard of objective reasonableness, judged from the perspective of a reasonable officer on the scene at the time of the incident. See Graham v. Connor, 490 U.S. 386, 395-96 (1989); Anderson v. Branen, 17 F.3d 552, 560 (2d Cir.

1994). At trial, plaintiff's counsel conceded that Cummings and King could not have known at the time of the incident that Fuller's rifle was unloaded, because this fact was first revealed by forensic tests conducted afterwards. Thus, the District Court correctly determined that this after-acquired evidence was not directly relevant under the Graham standard of objective reasonableness. Plaintiff contends, however, that this evidence might have been relevant as impeachment material for testing Cumming's perceptions, because Cummings testified that he had seen a muzzle flash from the direction of Fuller's rifle and had believed at the time that Fuller had fired on officer King. Nonetheless, after noting that Cumming's testimony was consistent with the muzzle flash having come from King's revolver rather than Fuller's rifle, the District Court ruled that the after-acquired evidence was not relevant to Cumming's testimony. Determinations concerning the relevancy and admissibility of preferred evidence are committed to lthe sound discretion of the District Court. See In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988 (Pagnusse v. Pan American World Airways, Inc.), 37 F.3d 804, 813 (2d Cir. 1994), cert. denied, 63 U.S.L.W. 3462 (1995). In view of the rationale given by the District Court and the risk of prejudice had the evidence been admitted, its exclusion was not an abuse of discretion.

2. Plaintiff also argues that evidence relating to marital and other stress allegedly affecting officer King should have been admitted because it was relevant to the reliability of King's perceptions. Regardless of the potential relevance of such evidence, the plaintiff's offer of proof failed to show that King had been under any

such stress, and this area of questioning was therefore properly prohibited.

3. Plaintiff contends that even if evidence relating to defendants' mental state was not relevant to the question of liability under the objective Graham standard, it was relevant to defendants' qualified immunity defense, because at the time Fuller was shot this Circuit employed the subjective test of Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973), for excessive force claims. However, the jury found that there had been no constitutional violation under the objective Graham standard. It was therefore unnecessary to reach the issue of qualified immunity.

The judgment of the District Court is affirmed.

Fuller v. Cummings, et al.
Docket No. 94-7418

/s/ _____
Chief Judge

/s/ _____

/s/ _____
Circuit Judges.

# DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT REGARDING PETITION FOR REHEARING

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of April, one thousand nine hundred and ninety-five.

Present:

HON. JON O. NEWMAN

HON. ELLSWORTH A. VAN GRAFFEILAND

HON. JOSE A CABRANES
Circuit Judges,

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94-7418 Fuller v. Cummings

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A petition for rehearing having been filed herein by Appellant,

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

GEORGE LANGE III, Clerk

By:/s/_____
Carolyn Clark Campbell,
Chief Deputy Clerk

pethrg frm
p/o/CCC

## CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid on this 6th day of July, 1995, to the following:

M. Jeffrey Spahr, Esquire
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_____
HOWARD T. OWENS, JR.

TO BE REPRINTED

95-374

NO. 94-7418

IN THE

Supreme Court, U.S.
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**UNITED STATES SUPREME COURT**

OCTOBER TERM, 1995

**ADELE FULLER, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF RALPH E. FULLER, JR.**

**Petitioner**

**v.**

**THOMAS CUMMINGS, MICHAEL KING, CARL LA BIANCA, THE CITY OF NORWALK AND NORWALK POLICE DEPARTMENT**

**Respondents**

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for the Respondents

## STATEMENT OF THE CASE

The following should be added to the Petitioner's Statement of the Case and/or be emphasized therein.

Petitioner's attorney agreed, at the time of trial, that the Respondent police officers could not possibly have known that the Petitioner's decedent's rifle had been unloaded at the time of the incident. Police Officer King fired his weapon (.38 handgun) prior to the weapon discharge of Police Officer Cummings. Petitioner's attorney, at the time of trial, further stipulated that King's weapon would also have created a muzzle flash (in addition to the weapon held by Fuller).

Police Officer Cummings testified that he saw a flash off to his left. He further testified that he believed that Fuller had shot Officer King.

However, Police Officer Cummings also testified that he did not know exactly where the shot came from. Further, he testified he had already decided to fire his weapon prior to seeing the flash.

## SUMMARY OF ARGUMENT

The reasonableness of the police officers' actions must be judged only by the facts known to them on the scene and at the moment of the incident.

## ARGUMENT

The Supreme Court held in *Graham v. Connor*, 490 U.S. 386 at 395, 109 S. Ct. 1865 at 1871, 104 L.Ed.2d 443, that an "objective reasonableness" standard would be employed to judge the constitutionality of police officers' activities in excessive force claims. Further, the Court held in *Graham v. Connor*, *supra*, as follows:

> "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight (citation omitted) ... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies ... The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation", *Id.*, 490 U.S. at 396-397, 109 S. Ct. at 1872.

Further, this "objective reasonableness" standard must be judged "in light of the facts and circumstances confronting them".

In the present case the Respondent Cummings never testified that he actually saw Fuller fire his rifle. He only testified that he saw a muzzle flash that came from the direction of both King and Fuller. In fact, Fuller's counsel stipulated that King's .38 revolver would also cause a muzzle

flash. Cummings also testified that he was not sure where the flash came from. He further testified that, in any case, he had already made his determination that it was necessary to fire his weapon.

In addition, any probative value that the weapon was unloaded, is outweighed by the prejudicial effect such evidence might have on the jury, Fed. R. Evid. 403; see *Scott v. Henrich*, 978 F.2d 41 (9th Cir.).

## CONCLUSION

The Respondents agree with the Second Circuit Court of Appeals' holding that "the District Court correctly determined that this after-acquired evidence was not directly relevant under the *Graham* standard of objective reasonableness".

Further, the Respondents agree with the Second Circuit Court of Appeals' determination of the District Court's discretion in ruling "that the after-acquired evidence was not relevant to Cummings' testimony" should not be disturbed.

THE RESPONDENTS

By _____

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**CERTIFICATION OF SERVICE**

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